

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

BRANDON TINGEY,
Plaintiff,

vs.

CITY OF SUGAR LAND, TEXAS
Defendant.

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CIVIL ACTION H-07-2391

ORDER

This matter is before the court on defendant's motion for leave to file an amended answer (Dkt. 58). Plaintiff opposes the motion on the ground that he will be prejudiced by defendant's last-minute assertion of two affirmative defenses.

Defendant moved at or near the close of discovery to assert the affirmative defenses of plaintiff's failure to mitigate damages and after-acquired evidence (essentially, that had it known then what it knows now, it would have transferred plaintiff out of the emergency response environment).

Leave to amend after the deadlines granted in the court's scheduling order is guided by Rule 16 of the Federal Rules of Civil Procedure. The Fifth Circuit has set forth the governing standard:


Federal Rule of Civil Procedure 16(b) governs amendment of pleadings once a scheduling order has been issued by the district court. Rule 16(b) provides that a scheduling order 'shall not be modified except upon a showing of good cause and by leave of the district judge.' The good cause standard requires the 'party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.'

Southwestern Bell Telephone Co. v. City of El Paso, 346 F.3d 541, 546 (5th Cir. 2003) (citing *S & W Enters., LLC v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003) (quoting 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1522.1 (2d ed. 1990))). The Fifth Circuit added: “In determining good cause, we consider four factors: ‘(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.’” *Id.* at 546 (citing *S & W Enters.*, 315 F.3d at 535).

In this case, defendant appears to have filed its motion within a reasonable amount of time of discovering the basis for the new affirmative defenses. The defenses, if proven, may significantly impact the amount of any damages due plaintiff. Plaintiff will not be prejudiced by the late amendment because all of the information relevant to the affirmative defenses is within the knowledge or control of plaintiff. The amendment will not require additional discovery. While the district court likely will not entertain a continuance of trial at this stage of the proceedings, plaintiff’s arguments as to the merits of defendant’s new affirmative defenses can be addressed upon appropriate motion in limine or at trial.

It is therefore ORDERED that defendant’s motion for leave (Dkt. 58) is granted.

Signed at Houston, Texas on September 4, 2008.


Stephen Wm Smith
United States Magistrate Judge